

**Coulter's Carpet Service, Inc. and Painters & Allied Trades Local 567, International Union of Painters and Allied Trades.** Case 32-CA-19305-1

November 22, 2002

**DECISION AND ORDER**

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The General Counsel seeks summary judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on December 21, 2001, the General Counsel issued the complaint on February 28, 2002, against Coulter's Carpet Service, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On April 5, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On April 9, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

**Ruling on Motion for Summary Judgment**

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated March 25, 2002, notified the Respondent that unless an answer were received by April 1, 2002, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, a Nevada corporation with an office and place of business in Sparks, Nevada, has been engaged in retail and nonretail sale and installation of floor coverings. During the 12-month period preceding the issuance of the complaint, the Respondent, in course and conduct of its business operations, received gross revenues in excess of \$500,000, and during that same period purchased and received goods valued in excess of \$5000 that originated from points

located outside the State of Nevada. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

At all times material herein, Curtis Wood occupied the position of Respondent's president, and is a supervisor of the Respondent within the meaning of Section 2(11) of the Act, and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees performing work in the job classifications set forth and described in Article I "Recognition Clause" of the July 1, 2001 to June 30, 2004 collective bargaining agreement between the Union and Respondent; excluding all other employees, guards and supervisors as defined in the Act.

Since at least July 1, 1998, and at all times material herein, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit, and since that date the Union has been recognized as the representative by the Respondent, an employer engaged in the building and construction industry, without regard to whether the majority status of the Union has been established under the provisions of Section 9 of the Act. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective for the period July 1, 2001 to June 30, 2004 (the Agreement).

At all times since July 1, 2001, the Union, by virtue of Section 8(f) and 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to wages, hours of employment, and other terms and conditions of employment.

On about May 18, 2001, the Union and the Respondent reached full and complete agreement on the terms and conditions of employment of the employees in the unit to be incorporated in a collective-bargaining agreement, which is effective for the period of July 1, 2001 to June 30, 2004.

Since about July 3, 2001, the Union has requested that the Respondent execute a written contract containing the Agreement.

On about July 17, 2001, the Respondent, acting through Curtis Wood, orally notified the Union that it would not sign the Agreement, and since that date has failed and refused to execute the Agreement.

Since on about July 1, 2001, the Respondent has made changes in the terms and conditions of employment of the unit employees including, but not limited to, discontinuing trust fund payments on behalf of unit employees and ceasing use of the Union's hiring hall.

These changes relate to the wages, hours of employment, and other terms and conditions of employment of the employees in the unit, and are mandatory subjects for the purpose of collective bargaining. The Respondent made these changes without the consent of the Union.

The Board has held that an employer's refusal to sign an 8(f) contract to which it orally agreed violates Section 8(a)(5) and (1) of the Act. *Ryan Heating Co.*, 297 NLRB 619, 620 (1990), enfd. denied on other grounds 942 F.2d 1287 (8th Cir. 1991); *Clarence Spight Contractor*, 312 NLRB 147 (1993). It follows that the aforementioned unilateral changes during what should have been the effective term of the Respondent's 8(f) agreement with the Union also violated Section 8(a)(5).

Contrary to our dissenting colleague, we do not find that the complaint's undisputed allegations fail to establish that the parties were privileged to enter into an 8(f) agreement. Section 8(f) permits "an employer engaged primarily in the building and construction industry" and "a labor organization of which building and construction employees are members" to enter into a collective-bargaining agreement without regard to whether the union's majority status has been previously established under Section 9(a). The complaint here simply alleges that the Respondent, which is engaged in the retail and nonretail sale and installation of floor coverings, is an employer engaged in the building and construction industry. The Board has held that such employers can qualify to enter into 8(f) agreements. *Painters Local 1247 (Indio Paint & Rug Center)*, 156 NLRB 951 (1966). The dissent, however, would require that the complaint specifically allege, in literal accord with the statutory provision, that the Respondent is primarily engaged in the building and construction industry. While we agree that it would have been preferable to include "primarily" in the complaint allegation, we do not find that the failure to do so defeats a motion for summary judgment in the absence of an answer raising any issue as to the amount of construction work actually performed by the Respondent. We therefore find that the Respondent's refusal to sign its 8(f) agreement with the Union and the subsequent unilateral changes violated the Act as alleged.

Our dissenting colleague's contrary view exceeds the requirements for a satisfactory complaint pleading. "All that is required of the complaint is that there be a plain statement of the facts claimed to constitute the unfair labor practice that Respondents may be put upon their defense. Moreover, a complaint in an administrative proceeding may not purport to set out the elements of a cause of action, like a declaration at law or a bill in equity." *Local 363 Boilermakers*, 123 NLRB 1877, 1913-1914 (1959).

#### CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has failed and refused to sign its May 18, 2001 agreement containing the terms and conditions of employment of the employees in the unit agreed upon by the Respondent and the Union, we shall order the Respondent to execute the Agreement, give retroactive effect to its terms, and make its unit employees whole for any losses attributable to the Respondent's failure to execute the agreement. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>1</sup>

In addition, having found that Respondent has violated Section 8(a)(5) and (1) by changing the terms and conditions of employment of the unit employees, including, but not limited to, discontinuing trust fund payments on behalf of unit employees, we shall order the Respondent to make whole its unit employees by making all such

<sup>1</sup> In the complaint, the General Counsel seeks an order requiring the Respondent to reimburse employees for any extra Federal or State income tax that would result from the lump sum payment of any backpay award to the employees. Granting this request would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985). In light of this, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by affected parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn. 1 (2000). Because there has been no such briefing in this case, we decline to include this additional relief in the Order here.

delinquent payments, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.<sup>2</sup>

Further, having found that the Respondent violated Section 8(a)(5) and (1) by ceasing use of the Union's hiring hall, we shall order the Respondent, pursuant to *J. E. Brown Electric*, 315 NLRB 620 (1994), to offer full employment to those applicants who would have been referred to the Respondent for employment by the Union were it not for the Respondent's unlawful conduct, and to make them whole for any losses suffered by reason of the Respondent's failure to hire them. Backpay is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed by *New Horizons for the Retarded*, supra. Reinstatement and backpay issues will be resolved by a factual inquiry at the compliance stage of these proceedings. *J. E. Brown*, supra.

#### ORDER

The National Labor Relations Board orders that the Respondent, Coulter's Carpet Service, Inc., Sparks, Nevada, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Painters & Allied Trades Local No. 567, International Union of Painters and Allied Trades, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following unit, by failing and refusing to sign its May 18, 2001 written agreement with the Union containing the terms and conditions of employment for unit employees. The unit is:

All full-time and regular part-time employees performing work in the job classifications set forth and described in Article I "Recognition Clause" of the July 1, 2001 to June 30, 2004 collective bargaining agreement between the Union and Respondent; excluding all other employees, guards and supervisors as defined in the Act.

<sup>2</sup> To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

(b) Changing the terms and conditions of employment of the unit employees including, but not limited to, discontinuing trust fund payments on behalf of unit employees and ceasing the use of the Union's hiring hall to hire employees for vacancies.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit employees by signing the May 18, 2001 agreement between the Respondent and the Union containing the terms and conditions of employment of the unit employees, give retroactive effect to that agreement, and make whole unit employees for any losses incurred as a result of the Respondent's failure to execute the written contract, with interest, as described in the remedy section of this decision.

(b) Honor the terms and conditions of the May 18, 2001 agreement with the Union by making all delinquent trust fund payments on behalf of unit employees, and making whole the employees in the unit by reimbursing them for any expenses ensuing from its failure to make the required payments, in the manner set forth in remedy section of this decision.

(c) Honor the terms and conditions of the May 18, 2001 agreement by utilizing the Union's hiring hall to hire employees for vacancies.

(d) Offer full employment to those applicants who would have been referred to the Respondent for employment by the Union were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by reason of the Respondent's failure to hire them, in the manner set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Sparks, Nevada, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2001.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BARTLETT, concurring in part.

I would make whole, but would not reinstate, employees who should have been referred to the Respondent. In this respect, I agree with the views expressed by former Members Hurtgen, Cohen, and Stephens that a reinstatement remedy should not be routinely ordered in hiring hall repudiation cases. See *M. J. Wood Associates, Inc.*, 325 NLRB 1065, 1068 fn. 9 (1998) (Member Hurtgen dissenting in part); *Baker Electric*, 317 NLRB 335, 336 fn. 4 (1995) (Member Cohen dissenting in part); and *J. E. Brown Electric*, 315 NLRB 620, 624–625 (1994) (Members Stephens and Cohen concurring). However, in the absence of a three-member majority to overrule Board precedent, I join in issuing a reinstatement remedy in this case.

MEMBER COWEN, dissenting.

Contrary to my colleagues, I would deny the General Counsel's Motion for Summary Judgment because the complaint on which it is based fails to establish sufficient facts to support finding the 8(a)(5) and (1) violations alleged.

The complaint alleges that the Respondent, by several acts, failed and refused to bargain collectively with the Union as the representative of its employees within the meaning of the Act. Under Section 9(a), an employer may be found to violate its duty to bargain only if the exclusive representative is designated by a majority of unit employees for such purpose. Under Section 8(f), this obligation extends to nonmajority representatives in

a limited, special circumstance. Under that Section, the duty to bargain may be extended where there is no proof of majority but only where an employer is "engaged primarily in the building and construction industry."<sup>1</sup>

The complaint alleges that the Union is the exclusive representative of the unit employees "by virtue of Section 8(f) and 9(a) of the Act." It further alleges that the Union "without regard to whether the majority status of the Union has ever been established under the provisions of Section 9 of the Act." Under these circumstances, it cannot be said that the factual allegations in the complaint, although un rebutted, establish that the Union has been designated as the exclusive representative by a majority of employees such that an obligation to bargain arises under Section 9(a).

Alternatively, an obligation to bargain with the Union would arise only if the undisputed facts establish that the Respondent is primarily engaged in the building and construction industry such that the special provisions of Section 8(f) apply. This the complaint also fails to establish. Although the complaint alleges that the Respondent is "engaged in the building and construction industry," it fails to allege that the Respondent is "engaged primarily" in this industry, as required by that section.

My colleagues contend that the Board has held that an employer engaged in the building and construction industry can qualify to enter into 8(f) agreements. They are right, the Board has held that it can, but *only* if it is *primarily* engaged in the building and construction industry. The very case cited by my colleagues, *Painters Local 1247 (Indio Paint & Rug Center)*, 156 NLRB 951 (1966), holds that in order for an employer to come within the scope of the narrow 8(f) exception it must be affirmatively shown that the employer is primarily engaged in the building and construction industry. As the Board stated:

We find merit in the General Counsel's contention that the burden of proof in determining whether the Employer herein is primarily engaged in the building and construction industry lies with the party seeking to avail itself of Section 8(f)'s statutory exception, in this case the Respondent Union. However, based on the entire record, we conclude that the evidence clearly indicates that the Respondent has adequately borne such burden.

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>1</sup> The plain language of Sec. 8(f) reflects clear legislative intent that employers coming within its scope must be engaged primarily in the building and construction industry; it is not sufficient for purposes of Sec. 8(f) that an employer merely be engaged in that industry. *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co.*, 746 F.2d 557, 563 (9th Cir. 1984).

Id. at fn. 1. Accord: *Bell Energy Management Corp.*, 291 NLRB 168, 169 (1988); *Brannan Sand & Gravel Co.*, 289 NLRB 977, 979 fn. 10 (1988).<sup>2</sup>

In sum, I find that the allegations of the complaint, although undisputed, are deficient because they fail to establish that the Respondent is obligated to bargain with the Union by virtue of any section of the Act. Thus, I would dismiss the complaint. My colleagues' contrary view both encourages sloppy pleading and nullifies a statutory requirement.

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Painters & Allied Trades Local No. 567, International Union of Painters and Allied Trades, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following unit, by failing and refusing to sign our May 18, 2001 written

agreement with the Union containing the terms and conditions of employment for unit employees. The unit is:

All full-time and regular part-time employees performing work in the job classifications set forth and described in Article I "Recognition Clause" of the July 1, 2001 to June 30, 2004 collective bargaining agreement between the Union and Coulter's Carpet Service, Inc.; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT change the terms and conditions of employment of the unit employees including, but not limited to, discontinuing trust fund payments on behalf of unit employees and ceasing the use of the Union's hiring hall to hire employees for vacancies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit employees by signing the May 18, 2001 agreement between us and the Union containing the terms and conditions of employment of the unit employees, give retroactive effect to that agreement, and make whole unit employees for any losses incurred as a result of our failure to execute the written contract, with interest.

WE WILL honor the terms and conditions of the May 18, 2001 agreement with the Union by making all delinquent trust fund payments on behalf of unit employees, and making whole the employees in the unit by reimbursing them for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL honor the terms and conditions of the May 18, 2001 agreement by utilizing the Union's hiring hall to hire employees for vacancies.

WE WILL offer full employment to those applicants who would have been referred to us for employment by the Union were it not for our unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by reason of our failure to hire them, with interest.

COULTER'S CARPET SERVICE, INC.

<sup>2</sup> The Board's decision in *Milwaukee & Southeast Wisconsin District Council of Carpenters*, 318 NLRB 714, 715-716 (1995), further supports my position. In that case, the Board noted the significant distinction between the language of the construction industry proviso of Sec. 8(e) (applying to "an employer in the construction industry") and that of Sec. 8(f) (applying to "an employer engaged primarily in the building and construction industry"). The Board relied on the pertinent language differences between the two subsections, as well as their differing purposes, to find them "analytically distinct."

In view of my finding that the complaint fails to establish that the parties have a relationship governed by Sec. 8(f), I find it unnecessary to pass on the correctness of the cases cited by the majority concerning an employer's refusal to sign an 8(f) agreement.